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IN THE

Supreme Court of The United States

October Term, 1967

No. 1042

EDWARD LAMAR GAY, *Petitioner*

vs.

CITY OF ORLANDO, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA FOURTH DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

DOMINICK J. SALFI
170 E. Washington Street
Orlando, Florida
Attorney for Petitioner

NORMAN BURKE
16 S. Magnolia Avenue
Orlando, Florida
Attorney for Respondent

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OPINIONS

The opinion of the District Court of Appeal for the State of Florida Fourth District is reported at 202 So2d 896.

JURISDICTION

The judgment and mandate of the District Court of Appeal, Fourth District, State of Florida, was entered on September 22, 1967. A timely petition for rehearing was filed on October 6, 1967, and was denied on the 26th day of October, 1967.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Does the introduction into evidence of a person's refusal to take a physical test constitute a denial of the privilege against self-incrimination, especially where he has not been advised of his constitutional rights.

CONSTITUTIONAL QUESTIONS INVOLVED
FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law . . ."

STATEMENT OF THE CASE

The Defendant, Edward Lamar Gay, appeared before the Municipal Court of the City of Orlando, Florida, on March 8, 1966, and entered a plea of not guilty to the charge of driving while intoxicated, (transcript of testimony, page 3).

Orlando Police Officer, Cletis J. Fort testified he was driving a patrol car when he observed the defendant automobile being driven in an unusual manner. He followed the defendant's automobile, and the defendant drove off the road twice, (transcript of testimony, page 8).

The police officer testified that he noticed an odor on the defendant's breath. That the defendant had a difficult time producing his drivers license, that he stumbled out of

his car, (transcript of testimony, pages 8-9), that he walked by holding onto the edge of the side of his car, (transcript of testimony, page 14), that his eyes were glazed and his speech was slurred, (transcript of testimony, page 20).

Orlando Police Officer Ralph B. Long testified he was with Police Officer Fort. Officer Long testified the defendant started to do certain tests, and he believed "he stopped". He testified the defendant's walk was "staggered", his speech slurred, that Officer Fort had to assist him in his walk and there was a slight struggle between the two. Further, he said the defendant "just about fell out" of his car "and appeared to be intoxicated", (transcript of testimony, pages 64-72).

During the trial the Municipal Judge sustained objections as to testimony of the defendant's refusal to take a breathalyzer test, (transcript of testimony, page 17). The Trial Judge also sustained objections as to questions relating to any other type of test except physical tests, (transcript of testimony, page 15).

The defendant was requested to perform a physical test by the arresting officer, and did perform such test. The following testimony of the arresting police officer, Cletis J. Fort, is contained on pages 11 and 12 of the transcript of testimony:

BY MR. PERKINS:

Q. Tell the Court exactly what happened at the time and place regarding the physical tests with the defendant?

A. I asked the defendant to watch me, because I wanted to give him a physical test for drunkenness. I explained and showed him what I wanted him to do.

Q. What did you tell him that you wanted him to do; tell the Court?

A. I told him to put his heels together, tilt his head back, put his arms out to his side; but he never reached that point.

Q. Did you demonstrate to him what you wanted done?

A. I did.

Q. Tell the Court and show the Court exactly how he reacted to that performance.

A. When I asked him to put his heels together he did that, and I told him to tilt his head back and he did that and then he lost his balance.

The arresting officer testified as to the refusal of the defendant to make a statement when explaining that the defendant was not cooperative. This testimony is contained on pages 18 and 19 of the transcript of testimony:

BY MR. PERKINS:

Q. Now, what happened at the time after you give the defendant the physical test that you have testified to; then what did you do with the defendant?

A. Took hold of his arm and took him to the car.

Q. What manner did you have to take him to the car?

A. I would say hold him enough so that he didn't turn around.

Q. Now, was the defendant cooperative?

A. No, sir.

Q. Tell the Court what he said and what he did in not being cooperative?

A. He said he wasn't going to tell me anything.

MR. SALFI: Your Honor, I object; this is totally improper. It is not responsive to the question; I cannot object to testimony like this.

THE COURT: I don't think there is anything objectionable about that: He said he wasn't going to tell him anything."

The defendant appealed the adjudication of guilty to the Circuit Court of the Ninth Judicial Circuit, as this was the Court with Appellate jurisdiction under Florida Law, (Florida Statute 932.52). The conviction of the Trial Judge was affirmed without opinion on January 19, 1967, (transcript of record, p 119).

Defendant then filed a petition for Writ of Certiorari in the District Court of Appeal, Fourth District, State of Florida, stating the following "Points Involved on Certiorari".

POINT I

DOES THE CIRCUIT COURT HAVE APPELLATE JURISDICTION WHERE A TRIAL COURT CONSTRUES A PROVISION OF THE FLORIDA OR FEDERAL CONSTITUTION?

POINT II

IS THE CIRCUIT COURT WHEN SITTING AS AN APPELLATE COURT REQUIRED TO TRANSFER AN APPEAL TO THE PROPER COURT WHEN IT DOES NOT HAVE JURISDICTION?

POINT III

DID THE TRIAL COURT IN THE INSTANT CASE CONSTRUE A CONTROLLING PROVISION OF THE FLORIDA OR FEDERAL CONSTITUTION?

The District Court of Appeal in an opinion dated September 22, 1967, denied the petition for writ of certiorari holding that although the Florida Constitution provided for district appeals to the Supreme Court of Florida in cases where the trial court rules on a controlling provision of the Florida or United States Constitution, (Fla. Const., Art. V, § 4(2). The Supreme Court of Florida had interpreted this provision of the Florida Constitution to mean that the trial court must make an actual construction or interpretation of a State or Federal Constitutional provision.

The District Court further said in the last paragraph of its opinion the following:

> "Thus we agree with petitioner that evidence of his refusal to take a breathalyzer test is inadmissible. The trial court sustained his objections, however, and an examination of the record does not indicate that the substantial rights of the petitioner were so affected that a mistrial should have been declared. F.S.A. § 924.33.
>
> The petition is denied."

ARGUMENT

The Defendant did not refuse to take all physical tests, but as pointed out in Respondent's summary, voluntarily took a balancing test and lost his balance. The testimony appears to be concerned with one physical test, described as a balancing test, or a finger to nose test. Defendant's objection to testimony in regard to his refusal to take a "breathalyzer" test were sustained. There does not appear to be a testimonial by-product of a refusal to take any test, physical or chemical, that was considered by the Court. Further, if a defendant takes one physical test, and then refused to take another, the simple explanation of a police officer that the defendant refused to cooperate further would hardly be a "testimonial by-product".

It is the Respondent's position that the police officer did not have to advise the defendant of his privilege of self-incrimination prior to requesting him to take either a physical or chemical test under the authority of *Schmerber* v. *California*, 1966, 384 U.S. 757, 86 S Ct 1826, 16 L Ed 2d 908.

The defendant's silence or refusal to cooperate with the arresting officer afforded no fair ground for a relevant influence of his guilt, and therefore is not a ground for granting this petition. In the instant case the Court clearly indicated that he did not consider any silence or refusal to cooperate as an inference of guilt, (transcript of testimony, pages 69-70). In this connection, it should be noted that the case was tried without a jury. It is therefore, obvious

that the matters cited by the defendant in his petition to this Court constitute a most, harmless error, Title 28, United States Code, § 2111 provides:

"§ 2111. Harmless error.

On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

In connection with the admission of evidence of a defendant's silence in face of questioning upon arrest, it is of interest to note two fairly recent cases decided by the United States Court of Appeals, Second Circuit.

In the first case, *U.S.* v. *Piccioli*, 352 F2d 856, testimony was submitted to the Court that a Special Agent shortly after a raid told the defendant that he would like to ask "a few personal history questions". Defendant's attorney happened to be present, and informed the officer that he had instructed the defendant not to answer any questions. Although defendant's counsel made no objection at the time, the trial judge, over the objection of defendant's counsel, elicited an affirmative answer from the special agent to the question, "But the defendant was instructed in your presence - - - not to answer any questions with respect to whether he was accepting horse wagers on the premises."

The Court of Appeals held the question by the trial judge was ill-advised and was not cured by the judge's sub-

sequent instruction to the jury that the attorney and the defendant had been acting within their rights, but was not ground for reversal.

• In the other case, *United States* v. *Mullings*, 364 F2d 173, the United States Court of Appeals, Second Circuit, reversed a conviction for theft. The United States Court of Appeals said, "the trial judge should not have given any weight whatever to the fact that, when Mullings was arrested, - - - Mullings "did not state he was in the terminal looking for someone," (this being the defendant's explanation of his presence on the scene, where he was accused of being a lookout).

In the case before the Court, if any testimony in the record as evidence of the defendant's silence, it is obvious that the Municipal Judge gave no weight to such testimony as reflected by the record. There was overwhelming evidence of defendant's guilt as reflected by the testimony of two police officers. Where the error committed in the admission of testimony is harmless, Certiorari should be denied.

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1. *U.S.* v. *McMaster*, C A Mich 1965, 345 F 2d 176, Certiorari denied 86 S Ct 42, 43, 382 U.S. 818 15 L Ed 2d 65, rehearing denied, 86 S Ct 529, 3 82 U S 1000, 15 L Ed 2d 486 (2 mems)

   Ahlstedt v. U.S. C.A. Fla 1963, 315 F 2d 62

CONCLUSION

For the reasons stated herein respondent respectfully urges that this petition for writ of certiorari should be denied.

Dated February _____, 1968.

NORMAN BURKE
Attorney for Respondent

CERTIFICATE

I, the undersigned member of the Bar of this Honorable court, do hereby certify that copies of the above and foregoing brief in opposition to Petition for Writ of Certiorari have been served upon opposing counsel by depositing the same, postage prepaid in the United States mail, at Orlando, Florida, this _____ day of February, 1968.

_____

NORMAN BURKE